Lean Siew Boon & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–305–11 OF 2011 AND P-05–306–11 OF 2011
AZAHAR MOHAMED, TENGKU MAIMUN AND HAMID SULTAN JJCA
10 OCTOBER 2013

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Criminal Law — Dangerous drugs — Trafficking — Accused persons charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Conviction of drug trafficking — Accused persons sentenced to death — Appeal against decision of High Court — Whether convictions safe

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused persons charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Conviction of drug trafficking — Accused persons sentenced to death — Whether trial judge erred in decision — Whether there were contradictions in evidence of prosecution — Whether there was gap in prosecution's case — Whether convictions safe

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Upon information received by SP7 from an informer that a certain drug trafficking activities would take place, the police carried out surveillance. The first appellant was seen driving a Datsun Sunny while the second appellant drove a Mercedes Benz. Both the appellants drove out of a condominium and the police tailed and monitored their movements until they came back to the condominium. The first appellant was later seen going into the Datsun Sunny. The first appellant stopped by a roadside and came out of the car, carrying a small dog. He stood in a lane beside a shop as if waiting for someone. The police sprung into action and arrested the first appellant. A body search on the appellant revealed several bunch of keys and a newspaper wrapping, inside which was one transparent plastic bag package containing white powdery substance suspected to be heroin. Meanwhile, the second appellant was arrested at the condominium's car park. The condominium was searched and SP7 headed to the first appellant's unit where there was a pungent acid smell emanating from under the door. The appellants were charged for three counts of trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The High Court judge held that by possessing the keys to the unit, there was incontrovertible evidence that the unit was under the care and management of the first accused and naturally, he had also access to it. The High Court found that the first accused was in joint and exclusive possession of all the drugs found in the unit together with the second accused. The appellants were convicted and sentenced to death. In the

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present appeal, the issue that arose was whether there were contradictions in the evidence of the prosecution in respect of the recovery of the drugs and the keys and on the gap of the prosecution's case. For the second appellant, it was questioned whether a prima facie case had been made out in the absence that he had possession of the drugs in the unit; and whether there was evidence that the second appellant was renting the said unit at the material time.

Held, allowing the appeals and setting aside the conviction and sentence:

(1) There was no evidence that they were in occupation of the said unit or were seen at the said unit at any time prior to them being brought to the said unit. The trial judge had failed to direct his mind to this point, which was a serious non-direction amounting to a misdirection. Hence, the appellants could not, prima facie be said be keeping, storing or manufacturing the drugs at the said unit at the material time (see paras 21–22).

(2) There was no basis for the trial judge to make an inference that the said unit was rented by the appellants for the sole purpose of processing, storing and trafficking in dangerous drugs. There was no evidence that the first appellant had rented the said unit. The first appellant denied that the keys to the said unit were recovered from him. The keys, ipso facto, did not prove possession of the drugs in the said unit, more so considering the contradiction in the evidence by the prosecution on the place where the keys were recovered. Neither did the recovery of the drugs from the trousers of first appellant prove possession by the first appellant of the drugs in the said unit (see para 22).

(3) There was a gap in the prosecution's case which had not been bridged. The onus was not on the defence to prove the possibility of others having access to the said unit but on the prosecution to exclude such possibility. The trial judge had seriously misdirected himself on this issue. To make out possession, there must be present a physical element and mental element. In the instant case, there was absent the physical element. The fact of the matter was that while the first and the second appellants were elsewhere, there were drug processing activities going on at the said unit. The trial judge had failed to recognise the significance of this fact. Had the learned trial judge done so, His Lordship would have found that custody and/or control and possession of the drugs by the appellants had not been proved (see paras 25–26).

[Bahasa Malaysia summary

Berdasarkan maklumat yang diterima oleh SP7 daripada pemberi maklumat bahawa aktiviti pengedaran dadah tertentu akan berlaku, polis telah menjalankan pengawasan. Perayu pertama telah dilihat memandu kereta Datsun Sunny manakala perayu kedua memandu kereta Mercedes Benz.

Kedua-dua perayu telah memandu keluar daripada sebuah kondominium dan polis telah mengekori dan mengawasi pergerakan mereka sehingga mereka datang kembali semula ke kondominium itu. Perayu pertama kemudiannya dilihat masuk dalam kereta Datsun Sunny. Perayu pertama telah berhenti di tepi jalan dan keluar daripada kereta itu, membawa seekor anjing kecil. Dia berdiri di laluan sebelah sebuah kedai seperti menunggu seseorang. Polis telah bertindak dan menangkap perayu pertama. Satu carian badan ke atas perayu menemui beberapa gugus kunci dan pembalut akhbar, di dalamnya terdapat bungkusan beg plastik yang mengandungi bahan serbuk putih disyaki dadah heroin. Manakala, perayu kedua ditangkap di parkir kereta kondominium itu. Kondominium itu telah diperiksa dan SP7 menuju ke unit perayu pertama di mana bau asid yang menusuk berpunca dari bawah pintu. Perayu-perayu telah dituduh dengan tiga pertuduhan pengedaran dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim Mahkamah Tinggi memutuskan bahawa dengan memiliki kunci-kunci kepada unit tersebut, terdapat keterangan yang tidak dapat dipertikaikan bahawa unit tersebut adalah di bawah jagaan dan pengurusan tertuduh pertama dan kebiasaannya, dia juga mempunyai akses kepadanya. Mahkamah Tinggi mendapati tertuduh pertama mempunyai milikan bersama dan eksklusif ke atas semua dadah yang ditemui di dalam unit tersebut bersama dengan tertuduh kedua. Perayu-perayu telah disabitkan dan dihukum mati. Dalam rayuan ini, isu yang berbangkit adalah sama ada terdapat percanggahan dalam keterangan pendakwaan berkaitan penemuan dadah dan kunci-kunci tersebut dan berhubung lompang dalam kes pendakwaan. Untuk perayu kedua, adalah dipersoalkan sama ada kes prima facie telah dibuat walhal dia tidak mempunyai milikan ke atas dadah di dalam unit tersebut; dan sama ada terdapat keterangan bahawa perayu kedua menyewa unit tersebut pada masa material.

Diputuskan, membenarkan rayuan-rayuan dan mengetepikan sabitan dan hukuman Mahkamah Tinggi:

(1) Tiada keterangan bahawa mereka mendiami unit tersebut atau dilihat berada di unit tersebut pada bila-bila masa sebelum mereka telah dibawa ke unit tersebut. Hakim perbicaraan telah gagal mengarahkan minda beliau kepada perkara ini, yang merupakan suatu tanpa arah yang serius yang membentuk salah arah. Justeru, perayu-perayu tidak boleh, secara prima facie dikatakan menjaga, menyimpan, atau membuat dadah itu di unit tersebut pada masa material (lihat perenggan 21–22).

(2) Hakim perbicaraan tiada asas untuk membuat inferens bahawa unit tersebut telah disewa oleh perayu-perayu bagi satu-satunya tujuan pemprosesan, penyimpanan dan pengedaran dadah berbahaya. Tiada keterangan bahawa perayu pertama telah menyewa unit tersebut. Perayu pertama menafikan bahawa kunci-kunci kepada unit tersebut telah didapati daripadanya. Kunci-kunci itu, *ipso facto*, tidak membuktikan

milikan dadah tersebut dalam unit tersebut, lebih-lebih lagi mempertimbangkan percanggahan dalam keterangan oleh pendakwaan berhubung tempat di mana kunci-kunci tersebut telah ditemui. Penemuan dadah itu daripada seluar perayu pertama juga tidak membuktikan milikan oleh perayu pertama ke atas dadah dalam unit tersebut (lihat perenggan 22).

(3) Dalam kes pendakwaan masih terdapat lompang. Beban bukan terletak ke atas pembelaan untuk membuktikan kemungkinan yang lain mempunyai akses kepada unit tersebut tetapi ke atas pendakwaan untuk mengecualikan kemungkinan tersebut. Hakim perbicaraan telah salah arah dengan serius berhubung isu ini. Bagi membuktikan milikan, perlu wujud elemen fizikal dan mental. Dalam kes ini, tiada elemen fizikal. Pada hakikatnya adalah semasa perayu-perayu pertama dan kedua di tempat lain, aktiviti-aktiviti pemprosesan dadah sedang berlaku di unit tersebut. Hakim perbicaraan telah gagal untuk mengiktiraf kepentingan fakta ini. Jika hakim perbicaraan yang bijaksana telah berbuat demikian, YA hakim akan dapati bahawa jagaan dan/atau kawalan dan pemilikan dadah oleh perayu-perayu tidak dibuktikan (lihat perenggan 25–26).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209, FC (refd)
Asdanusi Daut & Anor v PP [2004] 3 CLJ 669, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Saludin bin Surif v PP [1997] 3 MLJ 317, CA (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105b (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2)
Penal Code s 34

Appeal from: Criminal Trial No 45–40 of 2005 (High Court, Pulau Pinang)

Karpal Singh (Zaleha Al-Hayat with him) (Karpal Singh & Co) for the first appellant.

Hanif Hassan (Shaheera Zulkifli with him) (Hanif Hassan & Co) for the second appellant.
Kwan Lisa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] Both the appellants were charged and tried together at one trial in the High Court at Penang for three counts of trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act punishable under s 39B(2) of the same Act read together with s 34 of the Penal Code. The first charge was in respect of 8,252g of dangerous drugs (7842.8g of heroin and 409.2g of monoacetylmorphine); the second charge was in respect of 916.1g of ketamine while the third charge was in respect of 408.1 methamphetamine. The appellants were found guilty and were convicted and sentenced to death. They filed separate appeal against the conviction and sentence. We heard both the appeals together, at the end of which we were of the view that it was not safe to sustain the conviction. Our reasons now follow. (The appellant P-05–305–11 of 2011 and in P-05–306–11 of 2011 will be referred to as the first appellant and the second appellant respectively. They were the first and the second accused respectively in the High Court).

[2] Briefly, the case for the prosecution is as follows. Upon information received by ASP Giam Kah Hoon (SP7) from an informer on drug trafficking activities at Paya Terubong area in Penang, SP7 gathered six police teams from Bukit Aman, Kuala Lumpur on 13 February 2004 to depart to Penang. They went to Bukit Awana Condominium, Jalan Bukit Kukus, Paya Terubong, Ayer Itam, at about 2am on 14 February 2004 and saw the two targeted cars ie Datsun Sunny 120Y bearing registration No PW1747 and a Mercedes Benz No PFH 5522 parked below block 9 of the said condominium. They laid surveillance on Bukit Awana Condominium and on the said cars on 14 February 2004, 15 February 2004 and 16 February 2004.

[3] During the surveillance, the first appellant was seen driving Datsun Sunny 120Y while the Mercedes Benz was driven by the second appellant. The police teams tailed them and monitored their movements whenever they drove out from the condominium area until they came back to the condominium. During the tailing and surveillance, the police teams found no drug transaction activities by the appellants.

[4] At about 3.45pm on 16 February 2004, the first appellant was seen going into the Datsun Sunny 120Y. It was reported to SP7 that the first appellant stopped by the roadside in front of a shop called Kong Hock Tyre & Battery Service Centre at Paya Terubong. The first appellant was seen coming out of the

car carrying a small dog. He stood in a lane beside the shop as if he was waiting for someone. After a few minutes, upon the instructions of SP7, the police teams led by C/Insp Lee Lai Peng (SP5) and C/Insp Mohd Yusmin arrested the first appellant.

[5] A body search was done on the first appellant and the evidence of SP5 revealed that several bunch of keys and a newspaper wrapping, inside which there was one transparent plastic bag package containing white powdery substance suspected to be heroin, were recovered from the trousers of the first appellant. A search on the car found nothing incriminating. The first appellant was then taken to the condominium where a search was done at Unit No 6 on the 16th floor, Blok 9 where the first appellant lives. Nothing incriminating was found at Unit No 6.

[6] While the search was being carried out at unit No 6, the second appellant and Koay Gim Bee (said to be his wife) was arrested at the condominium's car park below Block 9 at about 4.30pm. Both the second appellant and the wife were taken to their residence at unit No 5, also on the 16th floor. A search was conducted on unit No 5. Nothing illegal was found.

[7] SP7 gave evidence that upon the fruitless search of units Nos 5 and 6, on his own initiative, he went up to the uppermost unit on the 31st floor in the same block to investigate whether any units are used for storing or processing drugs. He did not find anything suspicious on the 31st floor. He then went to the 30th floor. He saw one unit No 4–30–9 located in front of the elevator where the window was covered with card board. He suspected this unit to be the drug store. To confirm his suspicion, PW7 asked a Chinese boy 'di mana rumah seorang Uncle Cina yang mempunyai seekor anjing puppy'. SP7 said the boy pointed to unit No 4–30–9. Upon examination of the said unit, SP7 found that the front grille as well as the padlock and its front wooden door were locked. SP7 peeped underneath the front door gap between the floor. He saw no movement but he smelled the pungent smell of acid emanating from under the door. This was around 7pm on 16 February 2004.

[8] SP7 then directed the first and the second appellants to be brought to the 30th floor with all the keys seized from them. Three keys seized from the second appellant could not open the padlock. SP5 managed to open the front grille lock, the padlock and the wooden door from the bunch of keys, said to be taken from the first appellant. Inside unit 4–30–9, the police found household items ie a refrigerator, microwave oven and a hotplate and drug processing paraphernalia. Other items found were house owner/house holder insurance policy for the address at Block 9–16–5, Jalan Bukit Kukus, Bukit Awana, Paya Terubong in the name of Koay Gim Bee; two sales invoices from Makro; a grey T-shirt and one pair of Edwin jeans. The items were seized and handed over to

the investigating officer (SP11). After analysis, the chemist (PW2) confirmed that the drugs seized were heroin, monoacetylmorphines, methamphetamine and ketamine which formed the subject matter of the charges against the appellants.

[9] The owner of unit No 4–30–9 ('the said unit'), Khoo Heng Keong (SP6) had rented the said unit to the second appellant. Although the agreement between the second appellant and SP6 states that the rental was for the period between 15 December 1999 until 14 December 2000, it was the evidence of SP6 that the agreement was extended until 14 December 2002. SP6 further testified that the rentals were collected by his agent, Ah Hai (SP9) and that at the time the said unit was rented, it was empty; that he did not have any other set of keys to the said unit; and that from August 2003 onwards, he had not received any rentals from Ah Hai.

[10] SP9 who collected the rentals on behalf of SP6 states that the said unit was rented to the second appellant from 1999 until the day the second appellant was arrested in 2004 and that the first and the second appellants had came together or separately to pay the rentals of the said unit to him. SP9 further said that the last time he collected the rental for the said unit was in January 2004. He was not sure who paid the rental. His evidence was 'Rasanya Wang Kam Choon'.

[11] The learned trial judge made the following finding on custody and/or control and possession of the drugs as against the first appellant.

> By possessing the keys to the Unit No 4 on the 30 floor in Block 9, there is incontrovertible evidence that this particular unit was under the care and management of the first accused and naturally that he had also access to it. Leaving aside the second accused for the time being, no one else was found staying in this unit or having access to it. There was also no evidence led to show that apart from the first accused, another person also had a bunch of keys to this unit.
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> PW7 had also given evidence to say that in order to confirm his suspicion that this particular unit was used as an illegal laboratory to process drugs he had asked a Chinese boy there on where is the house that a Chinese uncle with a puppy (the first accused) and the boy had pointed to Unit No 4 on the 30th floor in Block 9. PW7 had testified that during the operation he had twice seen the first accused with the puppy. This piece of evidence fortifies the findings of the court that the first accused had care and management of the unit and therefore had custody and/or control and possession over all the drugs and drug processing items inside it.
>
> The first accused was already living in condominium Unit No 6 on the 16th floor in the same block 9, so there was no necessity for him to have another unit on the 30th floor in the same block. The only reasonable inference for the court to draw is that it was being rented for the sole purpose of processing, storing and trafficking in dangerous drugs.

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The discovery of the plastic packet of drugs of heroin (exh P42) found in the left trouser pocket of the first accused after he was just being arrested by PW 5 in front of Khong Hock Tyre & Battery Service Centre at Paya Terubong on the 16th of February 2004 at about 4.00pm is the nexus to all the drugs stored or being B processed in Unit No 4-30-9 and the court infers that the first accused had knowledge of the presence of all drugs in that rented unit. See *Leow Nghee Lim v R* [1956] MLJ 28.

By paying the monthly rentals and maintenance charges for the unit, it also reflected his knowledge on the presence of the drugs and other items inside the unit.

C …

The court finds that the first accused was in joint and exclusive possession of all the drugs found in the rented Unit No 4-30-9 together with the second accused (the role of the second accused will be delved with later on) and both of them had the D power of disposal with the drugs. The first accused possessed the keys to open this unit and thus he knew of the whereabouts of the drugs and had the power to do what he liked with them.

…

E Section 2 of the Dangerous Drugs Act 1952 (Act 234) defines 'trafficking', inter alia, as keeping, storing …Here it can be said the seized drugs were being kept or stored inside the Unit No 4-30-9 by the first accused and the second accused. The first accused was trafficking in dangerous drugs as stated in the three charges not forgetting that he was found to have the keys in his trousers pocket which opened the unit. He was having custody of the keys.

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[12] In respect of the second appellant, the learned trial judge made the following finding:

G The very fact that the second accused rented this unit only goes to show he had known of the purpose for renting it. The Tenancy Agreement dated the 15th of December 1999 (P44) and the evidence of PW9 (the agent of the landlord) and an independent witness only confirms the inference made by the court.

The very fact that the second accused had also on occasions paid the monthly rentals/maintenance charges for this particular unit to PW9 together with the first H accused or alone bolsters up the inference that the second accused was also managing and caring this said unit together with the first accused. Therefore he also had custody and/or control and possession over the drugs and other drug processing utensils recovered from this unit.

I The only inference for the court to draw is that this unit rented from PW6 was to process, store and eventually to traffic in dangerous drugs. The second accused together with the first accused cunningly rented the Unit No 4-30-9 located on the 30th floor for their drugs activities in order to distance themselves from their nefarious activities as both portrayed themselves to be ordinary family men living on the 16th floor side by side in the same Block 9.

> The discovery of … Insurance Policy for … the property … in the name of Koay Gim Bee, the wife of the second accused on the floor in one of the rooms of the rented unit No 4–30–9 is the link to the second accused. Why was the policy lying there on the floor in that rented unit? The only inference to draw was that it was brought there by the second accused and inadvertently left there.
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> Thus the second accused ought to have knowledge of the drugs and all the other exhibits found in that rented unit.
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> By paying the rentals and maintenance charges, it can also be inferred that the second accused was aware of the purpose of renting the unit and thus had knowledge of the drugs found inside the premises. This is compelling evidence.
>
> By keeping/storing the drugs mentioned in the three charges in the rented Unit No 4–30–9, the second accused was deemed to be trafficking in them by virtue of s 2 of Act 234. He had rented the unit for this purpose.

[13] On common intention, the learned trial judge found as follows:

> In this instant case, there was a pre-arranged plan by both accuseds to commit the offences. On the 15 December 1999 the second accused had rented the Unit No 4–30–9 from the owner of the unit named Khoo Heng Keong (SP 6). Both the first and the second accuseds paid the rentals/maintenance charges together or individually as testified by SP 9 who collected them on behalf of SP 6. The first accused possessed the keys to this rented unit but the second accused also had accessed to it by the discovery of ID 51A (the house insurance policy in the name of the wife of the second accused) inside the unit.
>
> Both the accused persons lived in the same Block 9 with their residential unit located side by side, being Units No 5–16–9 and 6–16–9. There was a padlocked grille (with combination numbers) to the common corridor leading to their units. This grille must be opened first before one could have access to either of the units.
>
> All this evidence only shows that both the accused persons with their close relationship had the common intention to commit the offences as stated in the three charges against them.

[14] The learned trial judge also found that the residential units of both the first and the second appellants on the 16th floor in physical proximity to the 30th floor in the same Block 9 where the drugs and the drug processing paraphernalia were found shows the element of possession. His Lordship found that a prima facie case has been made out against both the appellants and called upon them to enter their defence.

[15] The appellants gave unsworn statement from the dock. Both denied any knowledge of the drugs. The first appellant states that he had nothing to do with the said unit and he denied that he had the bunch of keys (six bunch totalling 22 keys) in his pocket. As for the second appellant, he states that he rented the said unit for one year from 1999 to 2000 and after the one year

period was over, he had since returned the keys to the agent, SP9. The second appellant states that Koay Gim Bee was not his wife but his girlfriend. He said that he visited her occasionally and this explained his presence at the condominium when he was arrested.

[16] His Lordship made the following remarks with regards the unsworn statement:

> … the court ponders on why both the first and second accuseds did not wish to give their evidence from the witness box if indeed what they had stated in their unsworn statements were true that in reality they had no connection whatsoever with the incriminating exhibits found in the Unit No 4 on the 30th floor in Block 9 at the Bukit Awana Condominium, then all the more they ought to have given sworn/affirmed testimonies as they had nothing to hide even though they would have been subjected to cross-examination.
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> …
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> In any event assuming even if they had apprehension about giving evidence from the witness box, being first-timers that apprehension is groundless as their learned defence counsels would be on standby to come to their aid in time of difficulty.
>
> Again if they had any religious reason for not taking the oath, they could have affirmed in the witness stand.

[17] The learned trial judge found that the appellants failed to raise a reasonable doubt on the prosecution's case, hence the conviction and sentence.

THE APPEAL

[18] Before us in essence, the complaint by the first appellant was that the learned trial judge had failed to undertake a maximum evaluation of the evidence and had misdirected himself seriously pertaining to certain findings in the grounds of judgment. Learned counsel had also highlighted the contradictions in the evidence of the prosecution in respect of the recovery of the drugs and the keys and on the gap in the prosecution's case. While the evidence of SP5 states that the drugs and the keys were found on the first appellant when he was arrested in front of the tyre shop, the search list (exh P47) shows otherwise ie that the drugs and the keys were not recovered from the trousers of the first appellant but from unit No 16 of the condominium. Learned counsel for the first appellant submitted that the learned trial judge failed to recognise the importance of a search list as adverted to in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 and *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209. Learned counsel for the first appellant submitted that the first appellant had nothing to do with the said unit as the rental agreement was between the second appellant and SP6.The gap in the prosecution's case (this issue is common to both the

appellants) relates to the non-calling of Koay Gim Bee, whose house insurance policy was found in the said unit and to the fact that there was a hot wok in the said unit at the time the police raided the said unit and that the prosecution had not excluded the possibility of others having access to the said unit.

[19] For the second appellant, learned counsel raised two grounds of appeal ie:

(a) that the learned trial judge erred in finding that a prima facie case had been made out against the second appellant in the absence of any evidence that the second appellant had possession of the drugs in the said unit; and

(b) that the learned trial judge erred in making a finding that the second appellant was renting the said unit and therefore had possession of the drugs as there was no evidence that the second appellant was renting the said unit at the material time.

OUR FINDINGS

[20] Having perused the grounds of judgment and the appeal records, we are of the view that the learned trial judge had misdirected himself in making the following findings:

(a) that apart from the first and the second appellants, no one else had access to the said unit;

(b) that the confirmation by the Chinese boy that the said unit was the house of the first appellant fortifies the finding that the first appellant had the care and management of the said unit;

(c) that the discovery of the drugs from the trousers of the first appellant is the nexus to the drugs found in the said unit and from the nexus, knowledge of the presence of drugs may be inferred;

(d) that by having the keys in his pocket, the first appellant was trafficking in dangerous drugs;

(e) that by paying the rentals together with the first appellant, the second appellant was also managing and caring for the said unit and therefore had the custody and/or control and possession over the drugs;

(f) that the only inference is that the first and the second appellants rented the said unit to process, store and traffic in dangerous drug; and

(g) that the presence of the insurance policy in the name of Koay Gim Bee

gives rise to an inference that it was the second appellant who had brought the insurance to the said unit and that he had inadvertently left it there.

[21] It is important to note that SP5 in his evidence said that 'ada kuali dalamnya ada serbuk putih bahan panas sedikit'. The presence of the hot wok shows that someone had access to and was present at the said unit, carrying out some activities prior to the discovery of the said unit by SP7 at 7pm on 16 February 2004. Both the appellants were not arrested at the said unit. The first appellant was arrested at about 3.45pm in front of the tyre shop while the second appellant was arrested at the car park area of Block 9 of the condominium at about 4.30pm. There was no evidence that they were in occupation of the said unit or were seen at the said unit at any time prior to them being brought to the said unit at about 7.30pm. The learned trial judge had failed to direct his mind to this point, which is a serious non-direction amounting to a misdirection. Hence, the appellants could not, prima facie be said be keeping, storing or manufacturing the drugs at the said unit at the material time.

[22] The learned trial judge accepted the evidence of SP7 on the confirmation by the Chinese boy that the said unit was the house of the first appellant as fortifying his Lordship's finding that the first accused had care and management of the said unit. That piece of information from the Chinese boy is hearsay evidence and ought not to be relied upon. There was no basis for the learned trial judge to make an inference that the said unit was rented by the appellants for the sole purpose of processing, storing and trafficking in dangerous drugs. There was no evidence that the first appellant had rented the said unit. The first appellant denied that the keys to the said unit were recovered from him. It is our judgment that the keys, ipso facto, do not prove possession of the drugs in the said unit, more so considering the contradiction in the evidence by the prosecution on the place where the keys were recovered. Neither does the recovery of the drugs from the trousers of first appellant prove possession by the first appellant of the drugs in the said unit. Further, 30th floor could not be said to be in close proximity to the 16th floor as found by the learned trial judge.

[23] Insofar as the second appellant is concerned, the evidence of SP6 was that the rental agreement was extended until December 2002. There was no evidence that at the material time, ie in February 2004, the said unit was rented out by SP6 to the second appellant. There was also no evidence that SP6 had received rental from SP9 until February 2004.

[24] Koay Gim Bee, whose insurance policy was found in the said unit was not called by the prosecution to testify. In making an inference against the

second appellant on the recovery of the insurance policy in the name of Koay Gim Bee, the learned trial judge had ignored the basic principle that where there are more than one inference, an inference most favourable to the second appellant ought to be drawn (see *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105b; *Asdanusi Daut & Anor v Public Prosecutor* [2004] 3 CLJ 669). The inference most favourable to the second appellant is that the insurance policy could have been brought to the said unit by Koay Gim Bee herself. It is also pertinent to note that no personal belongings of either the first or the second appellant were found in the said unit. There was no evidence that the T-shirt and the jeans recovered belong to either one of them.

[25] In the circumstances, we agree with the appellants that there is a gap in the prosecution's case which had not been bridged (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16). The onus is not on the defence to prove the possibility of others having access to the said unit but on the prosecution to exclude such possibility (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). We find that the learned trial judge had seriously misdirected himself on this issue when His Lordship said:

> This court views that the mere fact that there is evidence of access by other person or persons (leaving aside the accused persons/persons) to the premises or apartment unit where drugs and/or drug processing paraphernalia are found does not necessarily mean that there is a possibility such person or persons would have some form of involvement in the incriminating exhibits there.
>
> This is because it is a known fact of life that it will inevitably happen that certain categories of people will drop by any premises or apartment units and so forth like family siblings, friends, relatives, office colleagues, plumbers, television repairman, water and electricity meter readers etc at certain period. Therefore if such access occurs, it must be shown that there is an involvement in the incriminating exhibits in order to exculpate an accused. In the instant case, the prosecution had shown that there was no possibility of access by others to the unit.
>
> It must be borne in mind that both the accused persons lived on the 16th floor and therefore in close proximity to the 30th floor in the same block. Thus any attempt to gain unlawful access to the unit would sooner or later draw the attention of the first and second accused persons to such presence.

[26] To make out possession, there must be present a physical element and mental element (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237). In the instant case, there is absent the physical element. The fact of the matter is that while the first and the second appellants were elsewhere, there were drug processing activities going on at the said unit. The learned trial judge had failed to recognise the significance of this fact. Had the learned trial judge done so, His Lordship would have found that custody and/or control and possession of the drugs by the appellants had not been proved (see *Gooi Loo Seng v Public*

Prosecutor [1993] 2 MLJ 1; *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137; *Saludin bin Surif v Public Prosecutor* [1997] 3 MLJ 317).

[27] For the sake of completeness, we also find that the learned trial judge had misdirected himself in making the remarks concerning the course taken by the appellants to give an unsworn statement from the dock. As submitted by learned counsel for the first appellant, giving statement from the dock is a statutory right. There was no justification for the learned trial judge to make any comment or remark but to give the statements the necessary weight they deserved.

[28] In the light of the gap in the prosecution's case and the serious misdirection in the learned trial judge's grounds of judgment, we were of the view that the convictions were not safe. We therefore allowed both appeals and set aside the convictions and sentence by the High Court. The appellants were acquitted and discharged.

Appeals allowed and conviction and sentence set aside.

Reported by Afiq Mohamad Noor